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In The

Supreme Court of the United States

October Term, 1987

N.J. Ric., a Minnesota corporation, Kirk Dahl, Larry Kragen and Mary Kragen, individually and d/b/a Fiesta Images, Susan Davis, Robert Neal, Janet E. Wiest, Richard L. Anderson, Thomas J. Matt, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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58 pp

QUESTION PRESENTED

Whether petitioners' first amended complaint fails to allege a "pattern of racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of petitioners. Respondent Northwestern Bell Telephone Company is a wholly-owned subsidiary of U.S. West Communications, Inc., which in turn is a wholly-owned subsidiary of U.S. West, Inc. Respondent Northwestern Bell Telephone Company itself has no subsidiary or affiliated corporations.

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No. 87-1252

In The

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H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit entered its order denying rehearing en banc on October 23, 1987, *see* 829 F.2d 648 (8th Cir. 1987), and that order is reprinted in the Appendix at page 4. The Court of Appeals' opinion dated September 22, 1987, affirming

the District Court's dismissal of petitioners' claims, is reported at 829 F.2d 648 (8th Cir. 1987), and is reprinted in the Appendix beginning at page 5.

The memorandum and order of the United States District Court for the District of Minnesota dated February 18, 1987, denying petitioners' motion for reconsideration, is reported at 653 F. Supp. 908 (D. Minn. 1987), and is reprinted in the Appendix beginning at page 11. The District Court's memorandum and order dated November 24, 1986, granting respondent's motion to dismiss, is reported at 648 F. Supp. 419 (D. Minn. 1986), and is reprinted in the Appendix beginning at page 31.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order of the Court of Appeals denying rehearing en banc was entered on October 23, 1987. The petition for a writ of certiorari was filed on January 20, 1988, and the petition was granted on March 21, 1988.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961. Definitions

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and

punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . .

18 U.S.C. § 1962. Prohibited activites

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of

assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . . .

STATEMENT OF THE CASE

This action was commenced in July 1986 on behalf of a putative plaintiff class of all Minnesota purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners alleged that Northwestern Bell had engaged in dealings with certain members of the Minnesota Public Utilities Commission ("the MPUC" or "the Commission") that constituted bribery in violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42 (1986).[1] They claimed a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, Northwestern Bell had violated several provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. In a single allegation applicable to all legal theories, petitioners averred that the supposed violations injured all members of the alleged class and that the rates each of them was required to pay for Northwestern Bell's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; in essence, petitioners sought to have the trial court determine what were "fair and reasonable" rates and award them as damages their payments in excess of those court-determined rates.

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[1] In February 1987, a state grand jury sitting in Ramsey County, Minnesota, heard evidence concerning Northwestern Bell's actions relating to the MPUC and decided to return no indictments in connection therewith. *See* Minneapolis Star Tribune, Feb. 26, 1987, at 1A, 9A. *See also* note 6, *infra*.

Petitioners' first amended complaint (¶ 30) stated that Northwestern Bell "has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission." Appendix at 75. The supposed instances of such activity by Northwestern Bell were set forth in paragraphs 31 through 42 of the first amended complaint, and each such instance was utilized as a purported predicate act of bribery for purposes of petitioners' RICO claims under 18 U.S.C. §§ 1962(a)-(d) alleged in counts II through V.[2] Appendix at 75-81.

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[2] In count II of their first amended complaint, petitioners asserted a violation of 18 U.S.C. § 1962(a), averring that Northwestern Bell "has received income derived directly or indirectly through a pattern of racketeering activity involving at least two acts of bribery under Minn. Stat. § 609.42, subd. 1(1) and (2)" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 of this complaint" (¶¶ 50-51). Appendix at 78. Count III of petitioners' first amended complaint claimed a violation of 18 U.S.C. § 1962(b), alleging that Northwestern Bell and others "engaged in a pattern of racketeering activity consisting of at least two acts which involve bribery under Minn. Stat. § 609.42, subd. 1(1) and (2)," through which pattern of racketeering activity they "acquired or maintained, directly or indirectly, interest or control of the Public Utilities Commission" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 [of this complaint]" (¶¶ 58-60). Appendix at 79-80. In count IV of their first amended complaint, petitioners pled a violation of 18 U.S.C. § 1962(c), contending that Northwestern Bell and others

(Continued on following page)

Among the claimed acts were entertainment of several commissioners on various occasions (¶¶ 32-36, 42); free transportation to one commissioner on one occasion (¶ 31); and discussions with two commissioners during their membership on the MPUC that eventually led to their employment by Northwestern Bell after they left the Commission and payments to them for services rendered during said employment (¶¶ 37-42). Appendix at 75-77. Petitioners asserted injury in their business or property pursuant to 18 U.S.C. § 1964(c) on the basis that "the compensation Northwestern Bell was allowed to receive by the [MPUC] was in excess of what would be fair and reasonable charges to [petitioners] and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in [the first amended] complaint" (¶ 75). Appendix at 81.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. Appendix at 59. It then moved to dismiss all or various

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(Continued from previous page)

"conducted and participated directly or indirectly in the conduct and affairs of the enterprise [the MPUC] through a pattern of racketeering activity consisting of at least two acts of bribery" and that "[t]he predicate acts of bribery are referred to in paragraphs 29 through 42 [of this complaint]" (¶¶ 68-69). Appendix at 80. Count V of petitioners' first amended complaint alleged a violation of 18 U.S.C. § 1962(d) on the basis that Northwestern Bell and others supposedly "conspired together to violate the provisions of 18 U.S.C. § 1962(a), (b) and (c)" (¶ 73). Appendix at 81. Thus, the element of a "pattern of racketeering activity" was indispensable to all of petitioners' RICO claims.

parts of petitioners' first amended complaint on a number of different grounds.

By memorandum and order filed November 24, 1986, the District Court granted respondent's motion. The District Court ruled on only three of the numerous grounds for dismissal urged by Northwestern Bell.[3] It held: (1) that the averments of the first amended complaint failed to state a "pattern of racketeering activity" under RICO; (2) that petitioners' allegations under section 1962(a) of RICO failed to state a claim, in that Northwestern Bell was alleged to be both the "person" and the "enterprise" under that section; and (3) that, even if petitioners had adequately alleged violations of RICO, their claims under the statute were barred by the "filed rate" doctrine, because they sought to have the trial court establish that the "reasonable" rates for respondent's services were something other than the rates promulgated by the MPUC. 648 F. Supp. 419 (D. Minn. 1986); Appendix at 31.

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[3] Grounds for dismissal advanced by Northwestern Bell but not adjudicated by the District Court included, *inter alia*, the contentions that the MPUC is not an "enterprise" within the meaning of 18 U.S.C. §§ 1962(b) and (c); that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of section 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of section 1962(c). Northwestern Bell also argued to the District Court that petitioners' effort to revise telephone rates collaterally, if not barred altogether by the "filed rate" doctrine, at least raised factual issues within the primary jurisdiction of the MPUC, and that this action should be dismissed or stayed pending the MPUC's exercise of its jurisdiction.

Accordingly, the District Court dismissed petitioners' RICO claims with prejudice.[4]

Petitioners made a timely motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to "alter or amend" (*i.e.*, reconsider) the judgment of dismissal. The District Court denied that motion by memorandum and order dated February 18, 1987. 653 F. Supp. 908 (D. Minn. 1987); Appendix at 11.[5]

Petitioners then appealed to the United States Court of Appeals for the Eighth Circuit. On September 22, 1987, the Court of Appeals filed its opinion affirming the District Court based on petitioners' failure to allege a RICO "pattern of racketeering activity." The Court of Appeals did not consider the alternate bases for dismissal relied upon by the District Court. 829 F.2d 648 (8th Cir. 1987); Appendix at 5. On October 23, 1987, petitioners' petition for rehearing en banc was denied by the Court of Appeals. 829 F.2d 648 (8th Cir. 1987); Appendix at 4.

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[4] The District Court declined to exercise pendent jurisdiction over petitioners' claim for alleged violation of the Minnesota bribery statute, which it dismissed without prejudice. 648 F. Supp. at 429-430; Appendix at 54-55.

[5] Petitioners did not seek leave to replead their RICO allegations when they moved for reconsideration of the District Court's judgment of dismissal. After their suit was dismissed, petitioners filed a virtually identical action in state court, again making no material revision in their RICO claims. This action likewise was dismissed by the trial court, and that dismissal was affirmed by the Minnesota Court of Appeals on March 15, 1988. *H.J. Inc. v. Northwestern Bell Corp.*, 420 N.W.2d 673 (Minn. App. 1988). The Minnesota Supreme Court thereafter denied petitioners' request for further review. No. CX-87-1843 (Minn. May 16, 1988).

Petitioners sought a writ of certiorari from this Court on January 20, 1988, and their petition was granted on March 21, 1988. ___ U.S. ___, 99 L. Ed. 2d 420 (1988).

Because this action was disposed of on the pleadings in the District Court, their is no factual record. As the Court of Appeals recognized, of course, because petitioners' first amended complaint was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the facts alleged in that complaint must be viewed "in the light most favorable to them." 829 F.2d at 649; Appendix at 6. However, Northwestern Bell emphatically denies any illegality in its dealings with the MPUC and is confident that, if this action were ever brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.[6]

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[6] Petitioners erroneously imply that Northwestern Bell has been found guilty in a related proceeding of the wrongdoing alleged in their first amended complaint. *See* Brief of Petitioners at 4 n.1. The action referred to by petitioners, *In re Minnesota Public Utilities Comm'n*, 417 N.W.2d 274 (Minn. App. 1987), affirmed a finding of the MPUC that Northwestern Bell's *ex parte* contacts with commissioners gave the appearance of procedural impropriety with respect to one of the Commission's decisions. The instant first amended complaint avers criminal bribery, a much different charge which Northwestern Bell vehemently disclaims and which no court or other body has ever upheld. On the contrary, the MPUC itself, in investigating such charges, found no basis to conclude that there had been criminal wrongdoing; indeed, the Commission found no evidence even of procedural impropriety with respect to several other proceedings. *See* Order of the MPUC After Investigation, Docket No. U-999/CI-86-177 (April 2, 1987). Moreover, as has been noted, a grand jury that probed this matter voted not to return any indictments. *See* note 1, *supra*.

SUMMARY OF ARGUMENT

The place to begin resolution of the question presented in this case is with the ordinary meaning of the statutory term "pattern." In common, contemporary usage, "pattern" implies consistency, frequency, typicality, and widespread design. The legislative history of "pattern" as used in the RICO Act reinforces a construction compatible with plain meaning by emphasizing the "factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). Therefore, a RICO "pattern of racketeering activity" encompasses only continuous and related criminal acts that connote characteristic, persistent, and systematic wrongdoing of extensive proportion.

Using varying approaches, many of the courts of appeals have attempted to establish a "pattern" standard based on "continuity plus relationship." The United States Court of Appeals for the Eighth Circuit has required a showing of multiple criminal schemes to satisfy RICO's "pattern" element, and various other courts of appeals have exhibited reluctance to find a "pattern" where only one illicit scheme is alleged. Nevertheless, some of those courts have not made multiple schemes a singularly dispositive criterion, but have also looked to other factors to resolve the "pattern" issue, including: the character of the purported unlawful activity; the variety, number, and duration of the alleged predicate acts; the number of claimed victims and perpetrators; the occurrence of separate episodes or transactions giving rise to distinct injuries from predicate acts having independent harmful significance; the regularity of the asserted

unlawful conduct; and the existence of an ongoing criminal enterprise to which the averred illicit activity relates. The fundamental goal of the courts of appeals which have seriously grappled with the concept of "pattern" in the aftermath of this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), has been to bring the RICO Act in its civil applications back to the foundation of Congressional intent, and it is against the various standards which they have devised to effectuate the "continuity plus relationship" test that petitioners' RICO claims must be assessed.

The courts below correctly concluded that petitioners' RICO allegations do not manifest "continuity plus relationship" and thus fail to state a "pattern of racketeering activity." The Eighth Circuit's multiple-schemes condition, which fully comports with the ordinary meaning and legislative history of "pattern" and affords a bright-line measure of "pattern" averments, has not been met by petitioners, as the District Court determined and the Court of Appeals agreed. Moreover, even if this Court were to find it necessary to expand the scope of the inquiry into "continuity plus relationship" in order to consider more than the aspect of multiple schemes, analysis of the other potentially relevant factors identified by the courts confirms that a "pattern of racketeering activity" is absent here. As the District Court held, petitioners' "allegations do not fit the RICO paradigm" (653 F. Supp. at 915-916; Appendix at 27), and petitioners' assertion that they have properly pled a "pattern" under any test other than that of the Eighth Circuit is erroneous. *See* Brief of Petitioners at 35.

Unlike the prior criminal conviction and racketeering injury requirements rejected by this Court in *Sedima*, at issue here is a wholly appropriate limitation on the RICO Act, compelled by the statutory language and grounded in the legislative history, which is essential to prevent the statute's abuse. As this Court has recognized, a "meaningful" construction of "pattern" is central to rectifying the "increasing divergence" of RICO's utilization in its private civil version from Congressional intent. *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 500.

Formulations of RICO's "pattern" requirement suggested by petitioners and certain amici miss the mark in that they speak only to the facet of "relationship" while disregarding the component of "continuity." However, as the legislative history makes clear, "[i]t is this factor of *continuity plus relationship* which *combines* to produce a pattern" (S. Rep. No. 617, *supra,* at 158 (emphasis added)), and it is only through inclusion of the "continuity" attribute that "pattern of racketeering activity" can be harmonized with its plain meaning. A "pattern" within the purview of RICO must be evaluated in the factual context of each case and framed in terms of multiple schemes, as well perhaps as the other indicia which the courts have identified as signifying "continuity plus relationship" and which thus aid the "pattern" inquiry. Such a particularized, multi-consideration approach seems best suited to ensure the presence of "continuity plus relationship" and thus properly to limit the statute as contemplated by Congress. Such a preferred approach leads to the inescapable conclusion that petitioners have failed to aver an adequate "pattern of racketeering activity" within the meaning of the RICO Act. Accordingly,

the judgment of the Eighth Circuit upholding the dismissal of petitioners' RICO claims should be affirmed.

ARGUMENT

I. RICO'S "Pattern" Requirement Must Be Construed In Terms Of "Continuity Plus Relationship" In Accord With Ordinary Meaning And Legislative Intent

As always, " 'the starting point in every case involving construction of a statute is the language itself.' " *Kelly v. Robinson,* 479 U.S. 36, __, 93 L. Ed. 2d 216, 224-225 (1986), *quoting Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975); *accord United States v. Hohri,* 482 U.S. ___, ___, 96 L. Ed. 2d 51, 58 (1987). Indeed, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979); *accord Burns v. Alcala,* 420 U.S. 575, 580-581 (1975). Therefore, the proper place to begin analysis of the issue presented in this case is with the ordinary meaning of the term "pattern."

The apposite definition of the word "pattern" in The Random House Dictionary of the English Language 1423 (2d ed., unabridged, 1987) is "a combination of . . . acts . . . forming a consistent or characteristic arrangement." Webster's Ninth New Collegiate Dictionary 864 (1983) defines "pattern" as "frequent or widespread incidence" and as "a discernible coherent system based on the

intended interrelationship of component parts." Similarly, "pattern" is defined in Webster's New International Dictionary of the English Language 1794 (2d ed., unabridged, 1943) as "in a series of events, an arrangement of parts, elements, or details that suggests a design or orderly distribution." *See also* Black's Law Dictionary 1015 (5th ed. 1979) ("pattern" defined as a "reliable sample of traits, acts or other observable features characterizing an individual"); Webster's New World Dictionary 1042 (2d College ed. 1980) ("pattern" defined as "something representing a class or type . . . a regular, mainly unvarying way of acting or doing"). Thus, in contemporary usage, a "pattern" is manifested through consistency, frequency, typicality, and widespread design. As this Court observed in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), "in common parlance two of anything do not generally form a 'pattern.' "

Of course, it is "assume[d] 'that the legislative purpose is expressed by the ordinary meaning of the words used' " in a statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962); *accord Kosak v. United States*, 465 U.S. 848, 853 (1984). " 'Absent a clearly expressed legislative intention to the contrary,' the statutory 'language must ordinarily be regarded as conclusive.' " *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 862 (1983), *quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). With regard to the term "pattern" as used in the RICO Act, the legislative history supports an interpretation commensurate with common meaning.

Title 18 U.S.C. § 1961(5) provides that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." In *Sedima S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 496 n.14, this Court commented on the legislative history relevant to construction of section 1961(5) as follows:

> "As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' § 1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that '[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . .' 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO 'not aimed at the isolated offender'); House Hearings, at 665. . . ."

See also McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties*, 46 Notre Dame Law. 55, 144 (1970) ("commission of two or more acts of racketeering activity is made a necessary, but not a sufficient, element of a pattern under title IX").

The concept of "continuity plus relationship which combines to produce a pattern" as expressed in the Senate Report conforms with the ordinary meaning of "pattern." As Ronald L. Gainer, Deputy Chief of the Legislation and Special Projects Section of the Criminal Division of the Department of Justice, explained during hearings on S. 30, which ultimately became the RICO Act, "[t]he Senate committee in its report . . . resolved any question but that a continuity and relationship must be shown in order to establish a pattern . . . "; he emphasized that the bill "says 'pattern,' and pattern has to be construed with its normal meaning." *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 665 (1970). Not surprisingly, the Department of Justice applies such a limitation on "pattern" for purposes of criminal RICO prosecutions, stating in its RICO Guidelines for the Criminal Division that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction. . . . The purpose of this guideline is to prevent a pattern of racketeering activity being charged which *lacks the attributes which Congress had in mind* . . . ." 10 Department of Justice Manual, Title 9, §§ 9-110.340 and 9-110.341 (Prentice Hall 1988 Supp.) (emphasis added). *See also RICO Reform Legislation: Hearings on H.R. 2517, H.R. 2943,*

H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445 Before Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. 296 (1985 and 1986) (statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (the "practice [of plaintiffs bringing private civil RICO suits on the basis of only one criminal episode] is common enough to warrant concern that the purpose of the statute's 'pattern' requirement – to limit RICO to ongoing criminal activity – is not being fully realized").

The structure and purpose of the RICO Act were aptly summarized in the Civil RICO Report of the American Bar Association:

"In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers, and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to

maintain the constitutionality of a statute aimed primarily at organized crime."

Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law at 71-72 (1985) (footnote omitted); *see also Sedima, S.P.R.L. v. Imrex Co., supra*, 473 U.S. at 527 (dissent of Powell, J.) (expressing agreement with the view "argue[d] persuasively" in the ABA Report, and observing that "[t]he definition of 'pattern' may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved"); 116 Cong. Rec. 18940 (remarks of Sen. McClellan) ("Title IX[ ] . . . lists offenses committed by organized crime with substantial frequency, as part of its commercial operations. . . . Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX."). RICO's "pattern" element, which the Senate Report (No. 617, 91st Cong., 1st Sess. 158 (1969)) described as "essential to the operation of the statute," clearly encompasses only continuous and related criminal activities that connote characteristic, persistent, and systematic wrongdoing of widespread design, as both the ordinary meaning of the term and relevant legislative history demonstrate.[7]

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[7] As amici curiae Attorneys General of the States of Arizona, California, *et al.* acknowledge, "RICO's text . . . limits, but does not define 'pattern' " since the statute in section 1961(5) "requires at least two acts of racketeering activity" to constitute a "pattern" but does not provide that a "pattern" means two such acts. Brief of Amici Curiae States Attorneys

(Continued on following page)

II. Courts Of Appeals, Using Varying Approaches, Properly Have Attempted To Establish A "Pattern" Standard Based On "Continuity Plus Relationship"

In accord with the limiting focus of the RICO "pattern" requirement and especially in the aftermath of this Court's decision in *Sedima*, the courts of appeals have

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General at 9; *accord* Brief of Amicus Curiae Trial Lawyers for Public Justice at 16 ("RICO does not define 'pattern' "). Because this crucial "pattern" element is left undefined, the statute is subject to constitutional attack on vagueness grounds. As this Court held in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes omitted):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

See, e.g., Lanzetta v. New Jersey, 306 U.S. 451, 452-453, 458 (1939) (striking down a New Jersey statute proscribing membership in a "gang" as "vague" and thus "repugnant to the due process clause of the Fourteenth Amendment" where "gang" was defined only as "consisting of two or more persons"). Only by implying the "factor of continuity plus relationship" from the ordinary meaning of "pattern" and the legislative history of the statute's "pattern" requirement can the RICO Act provide an ascertainable standard and even arguably meet a vagueness challenge.

struggled to articulate a standard for determining whether particular factual allegations present a "pattern of racketeering activity." Although the approaches taken by the courts to this difficult problem have differed somewhat, most of the circuits have faithfully concentrated on fashioning a test of "pattern" that meets the Congressional mandate of "continuity plus relationship."

The United States Court of Appeals for the Eighth Circuit has developed a "pattern" criterion, which it applied in the instant case to dismiss petitioners' claims, that embraces the "factor of continuity plus relationship" by requiring averment of acts arising out of more than one criminal scheme. This criterion originated in *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986), wherein the Eighth Circuit held that multiple predicate acts of mail and wire fraud arising out of a single scheme did not satisfy RICO's "pattern" requirement:

> "Superior Oil has . . . failed to prove the 'continuity' sufficient to form a 'pattern of racketeering activity.' The actions of [the defendants] comprise one continuing scheme to convert gas from Superior Oil's pipeline. There was no proof that [the defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere. . . . Instead, the record reveals one isolated fraudulent scheme. On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 832 (N.D. Ill. 1985), that '[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. . . . It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.' "

Accord Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986) (allegations of fraudulent securities sales over the course of six years in the form of churning and misrepresentations in connection with one account did not state a "pattern"); *Holmberg v. Morrisette*, 800 F.2d 205, 210 (8th Cir. 1986), *cert. denied*, ___ U.S. ___, 95 L. Ed. 2d 526 (1987) (the "continuity" necessary to form a "pattern of racketeering activity" was not shown by multiple predicate acts of wire and mail fraud in furtherance of one scheme to draw down letters of credit securing the defendant's transactions with one of its customers); *but cf. United States v. Kragness*, 830 F.2d 842, 858 (8th Cir. 1987) (RICO'S "pattern" element was satisfied by evidence of three separate schemes – a scheme to import marijuana into La Junta, a second scheme involving cocaine and quaaludes, and a third scheme to import marijuana into the Phoenix area). The Eighth Circuit thus has sought to ensure the presence of "continuity plus relationship" combining to form a RICO "pattern" by making the existence of multiple illicit schemes dispositive.

The United States Court of Appeals for the Tenth Circuit has taken an approach substantially identical to that of the Eighth Circuit, refusing to find a "pattern" where "the single scheme at issue involved one victim . . . and had a single goal" since "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished" and thus "continuity" is not adequately shown. *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-929 (10th Cir. 1987); *accord Garbade v.*

Great Divide Mining & Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (finding the absence of "continuity," and hence no "pattern," where multiple secret withdrawals from corporate funds were pled, because there was only a "single objective" for such acts); *Condict v. Condict*, 826 F.2d 923 (10th Cir. 1987) (allegations of fraud, deceit, and misrepresentation, and use of the mails and wires more than twice in connection therewith, arising from a dispute over a family ranching operation failed to state a "pattern of racketeering activity" under RICO because of the absence of "continuity").

Similarly, the United States Court of Appeals for the Fourth Circuit, while concluding that "no mechanical test can determine the existence of a RICO pattern" and that "[w]hat constitutes a RICO pattern is thus a matter of criminal dimension and degree," has held that a complaint by investors alleging as predicate acts violations of the securities laws with respect to a sale of securities did not properly aver a "pattern of racketeering activity"; the court reasoned that a "single, limited fraudulent scheme . . . is not of itself sufficient to satisfy § 1961(5)" because the "element of continuity" is missing and that "[t]o allow a 'pattern of racketeering' to flow from a single, limited scheme . . . would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987); *accord Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488, 492 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (No. 87-1530 Feb. 17, 1988) ("a single, non-recurring scheme to defraud

a single entity by taking unfair competitive advantage," allegedly carried out through predicate acts of mail and wire fraud, did not establish a RICO "pattern" because it was found "wanting in the required degree of continuity of conduct"); *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 657 (1988) (RICO allegations against a developer involving mail fraud, wire fraud, and extortion spanning more than four years in the context of obtaining government permits and zoning approvals were held not to state a "pattern of racketeering activity").

The United States Court of Appeals for the Second Circuit has taken a somewhat different tack. After initially holding that, "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated," the "pattern" element of RICO is satisfied, *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986), *cert. denied*, ___ U.S. ___, 97 L. Ed. 2d 736 (1987), the Second Circuit has since upheld the dismissal of several RICO complaints on the ground that the alleged RICO "enterprise" lacked requisite continuity. *See, e.g., Creative Bath Products, Inc. v. Connecticut General Life Ins. Co.*, 837 F.2d 561, 563-564 (2d Cir. 1988); *Albany Ins. Co. v. Esses*, 831 F.2d 41, 44 (2d Cir. 1987); *Furman v. Cirrito*, 828 F.2d 898, 902-903 (2d Cir. 1987); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51-52 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 650 (1988). Most recently, however, the Second Circuit has revisited the RICO "pattern" issue, and, in finding the absence of a "pattern" in *Beauford v. Helmsley*, 843 F.2d 103, 110 (2d Cir. 1988) (Oakes, J.), *reh'g*

en banc granted (No. 87-7216 April 1, 1988), has delineated its position:

> "Essentially, then, the court has come some distance from *Ianniello*. Although . . . we speak in terms of 'enterprise' rather than 'pattern,' we nonetheless require continuity in any event, and find insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern. . . . [W]e must decide whether a discrete, even if widespread, and a continuing even if finite, scheme is sufficient to permit a plaintiff to take advantage of RICO. We hold that it is not."

The United States Court of Appeals for the Seventh Circuit also has stressed "continuity plus relationship" in analyzing RICO "pattern" questions. In *Medical Emergency Service Associates v. Foulke*, 844 F.2d 391, 395 (7th Cir. 1988) (citations omitted), the Seventh Circuit opined that "the existence of a 'pattern' as required by RICO must not focus excessively on either continuity or relationship, but rather must take into account both elements," and that "in order for the predicate acts to be sufficiently continuous to amount to a pattern of racketeering activity, 'the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.* "transactions somewhat separated in time and place." ' " In *Jones v. Lampe*, 845 F.2d 755, 757 (7th Cir. 1988) (citations omitted), the Seventh Circuit described its approach to the "pattern" requirement as follows:

> "Whether a RICO 'pattern' exists is clearly 'a fact-specific question encompassing many relevant factors,' including: (1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries. None of these factors is controlling standing alone, yet together, they provide the lens through which the courts may focus on the existence of 'continuity plus relationship.' "

Application of these principles has caused the Seventh Circuit to reject RICO claims in a number of cases arising out of a single scheme allegedly furthered by multiple predicate acts. *See, e.g., Jones v. Lampe, supra*, 845 F.2d at 758-759; *Medical Emergency Serv. Assocs. v. Foulke, supra*, 844 F.2d at 396-398; *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477, 479-480 (7th Cir. 1987); *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1112 (7th Cir. 1987); *Elliott v. Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1986); *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 323-324 (7th Cir. 1986). And even on "rare occasions" when the Seventh Circuit has recognized that " 'the mere fact that the predicate acts relate to only one overall scheme does not mean that the acts automatically fail to satisfy the pattern requirement,' " the existence of a "pattern" has rested on the independent harmful significance of the predicate acts. *Jones v. Lampe, supra*, 845 F.2d at 758, *quoting Appley v. West*, 832 F.2d 1021, 1027-1028 (7th Cir. 1987) (finding a "pattern" where two predicate acts of mail fraud in furtherance of one scheme caused separate injuries in that they involved two distinct conversions of funds); *see also Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304-1305 (7th Cir. 1987), *petition for cert. filed*,

56 U.S.L.W. 3531 (No. 87-1262 Jan. 28, 1988) (a "pattern" was stated where nineteen separate acts of mail and wire fraud pursuant to a single scheme each caused a distinct injury so as to inflict repeated economic harm on the victim); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986) (the "pattern" element was sufficiently asserted where separate acts of mail fraud over a period of several years relating to different events and thus causing distinct injuries were pled).

Like the Seventh Circuit, the United States Court of Appeals for the Third Circuit considers various factors in measuring whether RICO "pattern" allegations meet the "continuity plus relationship" test. In *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 40 (3d Cir. 1987), the Third Circuit stated:

> "We read the legislative history's reference to 'continuity' as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.' This determination necessarily depends on the circumstances of the particular case."

Elaborating on its "pattern" analysis in *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 66-67 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3592 (No. 87-1358 Feb. 12, 1988) (citations omitted), the Third Circuit noted that the "[f]actors relevant to the case-by-case analysis to which we referred in *Barticheck* include, but are not limited to, 'the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators,

and the character of the unlawful activity,' " and that "[t]he target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time." Employment of these considerations led the Third Circuit to hold in *Marshall-Silver Construction* that no "pattern" was shown on averments of a single, limited scheme with a single injury caused by only two perpetrators. *Id.* at 67.

The "pattern" issue also has been examined by the United States Court of Appeals for the First Circuit in *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) (citations omitted), in which it held:

> "Racketeering acts . . . do not constitute a pattern simply because they number two or more. The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurence. . . . We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode. . . . [G]iven the indeterminate nature of the statutory language, and the subtleties inherent in looking for 'continuity plus relationship,' no one characteristic can be considered as controlling in determining whether a pattern exists. In attempting to identify the order of magnitude at which acts constitute a pattern, the courts recognize that acts can be so closely interrelated in function and connected in time that the 'threat of [a] continuing activity' factor is absent. A bribe, which by any realistic appraisal is solitary and isolated, is not transformed into the threatening 'pattern of racketeering activity' with which Congress was concerned simply because the bribe is implemented in several steps and involves a number of

> acts of communication. . . . We hold that the bribery . . . did not constitute 'a pattern of racketeering activity.' "

In *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 500, this Court acknowledged that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," and that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses . . . and the failure of Congress and the courts to develop a meaningful concept of 'pattern.' " Many of the courts of appeals have responded to the challenge issued in *Sedima* by attempting to formulate a "pattern" standard founded on "continuity plus relationship."[8] Notwithstanding differences in approach, the fundamental goal has been to return the civil applications of the RICO Act to the mooring of Congressional intent, and it is against the pertinent standards devised to effectuate the "continuity plus relationship" test that petitioners' RICO allegations must be assessed.

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[8] In marked contrast to such laudable efforts to constrain RICO's "pattern" element in the wake of *Sedima*, the United States Court of Appeals for the Fifth Circuit, in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985), has rejected the argument that two mere related acts of mail fraud are insufficient to constitute a "pattern." *But see Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (urging that the *R.A.G.S. Couture* decision "be overturned en banc"). Similarly, the United States Court of Appeals for the Eleventh Circuit has held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts" so as to comprise a "pattern of racketeering activity." *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986).

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III. As The Courts Below Correctly Concluded, Petitioners' RICO Allegations Do Not Manifest "Continuity Plus Relationship" And Thus Fail To State A "Pattern Of Racketeering Activity"

Engagement in multiple illicit schemes, each furthered by sufficiently numerous, related predicate acts of racketeering activity, would in most instances conclusively establish the element of "continuity" essential to the finding of a RICO "pattern." Therefore, the Eighth Circuit's demand that multiple schemes be shown in order to satisfy RICO's "pattern of racketeering activity" requirement fully comports with the ordinary meaning and the legislative history of the statutory term "pattern."

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The United States Court of Appeals for the Ninth Circuit also has refused this Court's invitation to "develop a meaningful concept of 'pattern' " and has concluded simply that "two or more acts of racketeering activity" can make up a "pattern," reasoning that "RICO defines 'pattern of racketeering activity' without mentioning continuity. There is no suggestion that the underlying illegal acts must be part of different criminal episodes. The dictum in *Sedima* is suggestive, but without additional explication by the Supreme Court we decline to follow its lead." *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L. Ed. 2d 650 (1988) (citations omitted). And the United States Court of Appeals for the District of Columbia Circuit has ruled that acts engaged in "during a specific time period in pursuit of a unitary goal . . . meet[ ] the statutory requirements for a 'pattern of racketeering activity.' " *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 789 (D.C. Cir. 1988). These courts essentially have eschewed the command of Congress that a RICO "pattern of racketeering activity" be demonstrated by *both* "relationship" *and* "continuity."

It is clear that petitioners have not alleged multiple schemes. In essence, petitioners' first amended complaint averred that Northwestern Bell provided inducements to certain members of the MPUC so as to influence the Commission's action and enable Northwestern Bell to overcharge consumers of telephone services in the State of Minnesota. All of the purported predicate acts of "racketeering activity" in which Northwestern Bell supposedly engaged were substantively of the same nature and for the same purpose. Fairly read, petitioners' first amended complaint contended that Northwestern Bell participated in a single scheme or episode involving multiple acts of "bribery" with a common objective, resulting in petitioners' claimed injury. The courts below refused to compartmentalize and segregate the alleged predicate acts artificially in order to manufacture a "pattern of racketeering activity." As the District Court persuasively reasoned:

> "Here, [petitioners'] amended complaint includes no allegations of separate transactions – merely separate predicate acts – and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by [petitioners] was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. . . . [Petitioners] simply have not alleged that [respondents] have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere."

653 F. Supp. at 914; Appendix at 23-24. The Eighth Circuit appropriately concurred in this conclusion. 829 F.2d at 650; Appendix at 8 (petitioners' "complaint alleges no more that a series of fraudulent acts 'committed in furtherance of a single scheme to influence MPUC commissioners . . . ' ").

Although the Eight Circuit's multiple-schemes criterion has the considerable advantage of affording a bright-line test by which to evaluate RICO "pattern" averments, it has drawn criticism for being unduly restrictive in its application as the sole dispositive measure of "continuity plus relationship." Yet, even if this Court were to expand the scope of the inquiry into "continuity plus relationship" in order to encompass more than the aspect of multiple schemes, analysis of other potentially relevant factors likewise supports the determination that a "pattern of racketeering activity" is absent here. Such fact-specific additional considerations as the character of the purported unlawful activity; the variety, number, and duration of the alleged predicate acts; the number of claimed victims and perpretrators; the occurrence of separate episodes or transactions giving rise to distinct injuries from predicate acts having independent harmful significance; the regularity of the asserted unlawful conduct; and the existence of an ongoing criminal enterprise to which the averred illicit activity relates, have been designated by the courts, including the Seventh Circuit, the Third Circuit, and the Second Circuit, as apposite to identification of "continuity plus relationship" and thus to resolution of the RICO "pattern" issue. *See, e.g., Jones v. Lampe, supra,* 845 F.2d at 757; *Marshall-Silver Construction Co. v. Mendel, supra,* 835 F.2d at 66-67; *United States v. Ianniello, supra,* 808 F.2d at 192; *Lipin Enterprises Inc. v. Lee, supra,* 803 F.2d at 324. Scrutiny of such considerations in the context of this case only further confirms that petitioners have failed to state a "pattern of racketeering activity" within the meaning of the RICO Act.

Petitioners' first amended complaint concerned one alleged corporate perpetrator – Northwestern Bell; one type of purported illegal activity – bribery; one claimed target entity – the MPUC; one supposed central objective – obtaining remuneration in excess of "fair and reasonable" charges; and one unitary, identifiable group of alleged victims – Northwestern Bell's Minnesota ratepayers. Northwestern Bell's purported conduct as pled by petitioners was not aimed at various claimed "victims" or "targets," but, rather, dealt only with the MPUC and had only alleged indirect impact on its ratepayers as a collective body. *See, e.g., Satellite Financial Planning Corp. v. First Nat'l Bank of Wilmington*, 646 F. Supp. 118, 120 (D. Del. 1986) (noting that " 'the repetition of an act taken against a single victim or set of victims . . . suggests no expansion, no ongoing design, no continuity such as was the target of Congress in RICO' ").

Moreover, the nature of the predicate acts averred by petitioners can be summarized as instances of entertainment of certain members of the MPUC, provision of free air transportation for one commissioner on one occasion, and premature negotiation of employment terms with two commissioners. *See* First Amended Complaint ¶¶ 31-42; Appendix at 75-77. This supposed conduct by Northwestern Bell hardly epitomizes the serious "racketeering activity" that RICO was designed to eradicate. *See, e.g.*, S. Rep. No. 617, *supra*, at 41 ("gambling, narcotics, loan sharking, or other illegal businesses"); 116 Cong. Rec. 586 (1970) (remarks of Sen. McClellan) ("syndicated gambling, the importation . . . and distribution of narcotics, and loan sharking"); *id.* at 591 (remarks of Sen. McClellan) (narcotics, loan sharking, prostitution, and bootlegging); *id.* at 601 (remarks of Sen. Hruska) ("robbery, larceny, and arson"); *id.* at 36296 (remarks of Sen.

Dole) ("arson and murder" in the context of attempts to compel the purchase of product from a mob-controlled business); Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, *supra*, at 72 (the statute is intended to reach "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises"); *cf. United States v. Turkette*, 452 U.S. 576, 579 (1981) (involving " 'a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings' "). Rather, such purported actions obviously appear more akin to perquisites accorded in the context of traditional lobbying efforts in the political arena.[9] As the Fourth Circuit has noted in

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[9] Minnesota law defines "lobbyist" as any person "who spends more than $250 . . . in any year for the purpose of attempting to influence legislative or administrative action by communicating . . . with public officials." Minn. Stat. § 10A.01, subd. 11(b) (1986). Lobbyists are required to register with the state ethical practices board, Minn. Stat. § 10A.03 (1986), and to file regular reports which detail their lobbying expenditures in a number of categories, such as "entertainment provided to public officials including but not limited to sporting, theatrical, and musical events" and "food and beverages provided to public officials. . . . " Minn. Rules § 4510.0500, subp. 3(F) & (G) (1987). These provisions suggest that many of the acts alleged in petitioners' first amended complaint would be regarded, under Minnesota law, as legitimate lobbying activity.

stressing "Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being," "[w]hat constitutes a RICO pattern is . . . a matter of criminal dimension and degree." *International Data Bank, Ltd. v. Zepkin, supra,* 812 F.2d at 155; *accord HMK Corp. v. Walsey, supra,* 828 F.2d at 174 ("The existence of a pattern thus depends on context, particularly on the nature of the underlying offenses. Attention to the nature of the underlying offenses is necessary because the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine."). The requisite "criminal dimension and degree" for the establishment of a "pattern" are plainly missing in petitioners' RICO allegations.

Also absent from petitioners' RICO claims is any delineation of separate criminal episodes or transactions resulting in distinct injuries arising from claimed predicate acts having independent harmful significance. As the court explained in *Ghouth v. Conticommodity Services, Inc.*, 642 F. Supp. 1325, 1336-1337 (N.D. Ill. 1986) (citations omitted):

> "The cases reveal several characteristics of the 'episode' which are important, and which are consistent with and flow from the underlying concept of 'continuity.' Probably the most important factor is that the criminal acts cause 'independent harmful significance,' *i.e.*, cause more than one basic injury. This captures the idea that to be 'continuous,' criminal activity and injury should repeat or recur. After all, RICO was designed to combat multiple, systematic infliction of harm . . . . What divides [a] scheme into 'episodes' is multiple, distinct injuries, separated

> in time and place. This is the factor that eliminates . . . RICO abuse . . . . "

Petitioners here cannot and do not contend that each meal or sporting event ticket allegedly provided by Northwestern Bell to a MPUC commissioner standing alone caused a distinct harm to them; instead, it is only through the action of the MPUC in approving what petitioners characterize as "unreasonable" rates that petitioners seek to aver injury. Yet, nowhere in their first amended complaint do petitioners tie the purported predicate acts to any resulting votes cast by particular commissioners in the context of specific rate proceedings. *Cf. Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (the "by reason of" language of section 1964(c) "imposes a proximate cause requirement on [RICO] plaintiffs" so that "[t]he criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property"). While petitioners make vague reference to "tainted hearings" and the United States as amicus curiae suggests that petitioners' allegations should be viewed as comprehending multiple efforts by Northwestern Bell "to obtain favorable treatment in several particular rate-setting votes" over the period covered by the first amended complaint (Brief of Petitioners at 5; Brief of Amicus Curiae the United States at 8 n.3), such averments simply are not part of petitioners' pleading and it is axiomatic that "a party is not entitled to amend his pleading through statements in his brief." *Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F. Supp. 518, 526 (S.D.N.Y. 1977); *accord Chambliss v. Coca-Cola Bottling Corp.*, 274 F. Supp. 401, 409 (E.D.

Tenn. 1967), *aff'd*, 414 F.2d 256 (6th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970).[10]

In addition, because the "pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who *regularly* commits such crimes" (*Lipin Enterprises Inc. v. Lee, supra*, 803 F.2d at 324 (emphasis added)), analysis of "pattern" averments should not "stop at requiring a showing of multiple episodes because this alone does not adequately resolve the tension between isolated and ongoing activity." *Papai v. Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986). As the court in *Papai* reasoned, "RICO's purposes are best served by also requiring that, from the pleadings, a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a *regular* part of the way a defendant does business and in that sense, ongoing." *Id.* (emphasis added). Clearly, there is no suggestion whatsoever in this case that bribery or any other crime is a customary activity on the part of Northwestern Bell. There is no indication that the purported illicit conduct pled by petitioners

[10] Petitioners never have materially amended their RICO allegations, although they have had several opportunities to do so. *See* note 5, *supra*. Thus, the presumption is warranted that petitioners are unable to plead distinct injuries arising from separate episodes or transactions.

is in any way regular, typical, or characteristic of Northwestern Bell's operations; that such conduct is a significant, as opposed to incidental, part of Northwestern Bell's relationship with the MPUC; and therefore that such conduct constitutes a RICO "pattern of racketeering activity." The notion of a "pattern" existing in this case is at odds with the manifest intent of Congress in the RICO Act to provide a remedy with respect to those persons and entities engaged in pervasive criminality, not to address claimed aberrational activities of legitimate businesses such as Northwestern Bell.

Further, there is no ongoing criminal enterprise here to supply the element of "continuity" for the establishment of a RICO "pattern of racketeering activity." *See* Brief of Amicus Curiae the United States at 18-19 (arguing that "[t]he thread of continuity, and hence the required pattern, is also present where predicate crimes are committed that in fact benefit an ongoing criminal enterprise . . . , where such an enterprise made possible or facilitated the commission of the predicate crimes . . . , or where the predicate crimes were the defendant's way of participating in such an enterprise"). Unlike *United States v. Ianniello, supra*, 808 F.2d at 186-189, where there was an ongoing association-in-fact "enterprise" operating to skim profits from bars and restaurants and to defraud the tax authorities and where the multiple predicate acts charged related to the conduct of that illegitimate enterprise's affairs, here the "enterprise" alleged by petitioners for purposes of their RICO claims is either Northwestern Bell itself or the MPUC. *See* First Amended Complaint ¶¶ 49, 57, and 65; Appendix at 78-83. Such wholly legitimate entities as the business corporation and

governmental body pled as RICO "enterprises" by petitioners unquestionably do not substitute for a continuous criminal confederation in terms of demonstrating the existence of a "pattern" under the RICO Act.[11]

Accordingly, even if this Court finds it necessary to look beyond the multiple-schemes criterion applied by the Eighth Circuit, examination of those additional factors identified by courts as salient for purposes of evaluating the sufficiency of RICO "pattern" allegations demonstrates that "continuity plus relationship" is not present in this case and that petitioners' RICO averments thus do not meet the statute's "pattern" requirement. Indeed, the District Court, after discussing the several pertinent factors highlighted by other courts, convincingly concluded that petitioners' "allegations do not fit the RICO paradigm" in that they have "not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries," and that the averred "pattern" cannot be described as a " 'regular part of the way' [Northwestern Bell] conduct[s] [its] business." 653 F. Supp. at 915-916; Appendix at 27.

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[11] The United States as amicus curiae makes precisely this point: "We do not suggest that the mere fact that several similar crimes are all related in some way to a legitimate enterprise makes a pattern of those crimes. When the crimes are related . . . to a *criminal* enterprise, however, that fact supplies the required element of continuity among the defendant's criminal acts. . . . [T]he fact that the enterprise in certain cases helps establish the pattern in no way equates the two elements or makes one of them redundant." Brief of Amicus Curiae the United States at 19 n.10 (emphasis in original).

Petitioners simply are wrong when they contend that they have properly alleged a "pattern" "under any test used by any circuit other than the Eighth Circuit." Brief of Petitioners at 35. To the contrary, under the standards enunciated by circuits that have seriously grappled with the meaning and application of "continuity plus relationship," petitioners' first amended complaint fails to plead an adequate "pattern of racketeering activity" as required by the RICO Act.

In *Sedima*, this Court recognized Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." 473 U.S. at 498. Consequently, the Court rejected, as a "form of statutory amendment [not] appropriately undertaken by the courts," efforts to engraft onto the RICO Act a prior criminal conviction requirement and a racketeering injury requirement, reasoning that such prerequisites were without "support in the statute's history, its language, or considerations of policy." *Id.* at 493, 500. Nevertheless, the Court, after specifically discussing the limited scope of "pattern of racketeering activity," expressed its "doubts" about the "increasing divergence" of RICO's utilization in its private civil version from Congressional intent, and identified the "failure . . . to develop a meaningful concept of 'pattern' " as a primary cause of the problem. *Id.* at 496 n.14, 500. Thus, despite petitioners' and certain amici's attempts to portray this case as involving just another baseless obstruction to RICO's proper operation of the kind rebuffed in *Sedima*, in fact at issue here is a wholly appropriate limitation, grounded in the legislative history and compelled by the

ordinary meaning of the statutory language, which is essential to prevent the law's abuse. *See id.* at 496 n.14.

Unless a "meaningful" construction of "pattern" that embraces the "factor of continuity plus relationship" is adopted and applied by the courts, every commercial dispute involving some series of related events can be characterized as a "pattern" and federalized into a RICO cause of action, even though such result certainly was not the design of Congress. *See, e.g., International Data Bank, Ltd. v. Zepkin, supra,* 812 F.2d at 154-155 ("If the commission of two or more 'acts' to perpetrate a single fraud were held to satisfy the RICO statute, then every fraud would constitute 'a pattern of racketeering activity.' It will be the unusual fraud that does not enlist the mails and wires in its service at least twice. Such an interpretation would thus eliminate the pattern requirement altogether."); Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, *supra,* at 55-56 (of 270 known RICO cases at the trial-court level, only 9% "involve[d] allegations of criminal activity of a type generally associated with professional criminals"); *Sedima, S.P.R.L. v. Imrex Co., supra,* 473 U.S. at 499 n.16.[12] An appropriately constrained explication of "pattern," far from an unfounded hindrance, is key to effectuating the true purpose of the RICO Act.

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[12] In his dissent in *Sedima,* Justice Marshall, joined by Justices Brennan, Blackmun, and Powell, noted "the 'extraordinary uses' to which the statute has been put, in which legitimate businesses that have engaged in two criminal acts have been labelled 'racketeers,' have faced treble-damages judgments . . . , and have often settled to avoid the destructive

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While they argue that this Court "should develop a meaningful approach to the definition of 'pattern,'" petitioners approvingly cite the construction of the "pattern" element by some courts that mandates no more than a showing of "two related acts in connection with an enterprise," suggesting that "[s]uch an interpretation would alleviate the problem of notice because there would be no doubt as to the requirements of RICO." Brief of Petitioners at 24-25, 31. Similarly, the United States as amicus curiae contends that "the thread of continuity needed to tie together the commission of predicate crimes so that they form a pattern is present at least when- . . . each predicate crime is 'connected with the other by some common scheme, plan or motive so as to constitute a pattern.'" Brief of Amicus Curiae the United States at 18. These proffered formulations of "pattern of racketeering activity" under RICO, however, miss the mark in that they speak only to the component of "relationship" but disregard the facet of "continuity." As the legislative history makes clear, "[i]t is this factor of *continuity plus relationship* which *combines* to produce a pattern." S. Rep.

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publicity and the resulting harm to reputation," emphasizing that:

> "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect."

473 U.S. at 520.

No. 617, *supra*, at 158 (emphasis added). And it is only through inclusion of the "continuity" feature that "pattern of racketeering activity" can be harmonized with its plain meaning of typical, consistent, and systematic wrongdoing of widespread design.

Instead of such one-dimensional standards, a "pattern" within the purview of RICO must be evaluated within the factual context of each case in terms of the specific subsection(s) of 18 U.S.C. § 1962 as to which a violation is alleged, and must be scrutinized using the criteria of multiple schemes, as well perhaps as the other factors, detailed above, which courts have designated as evincing "continuity plus relationship" and which therefore aid the "pattern" inquiry. *See* discussion, *supra*, 33-41. Such a particularized, multi-consideration approach appears best suited to ensure the presence of "continuity plus relationship" in each individual RICO case and thus properly to limit the statute as contemplated by Congress.[13] In this case, that preferred approach inescapably leads to the conclusion that petitioners have failed to state an adequate "pattern of racketeering activity" within the meaning of the RICO Act.

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[13] This approach is in accord, insofar as it pertains to the aspect of "relationship," with the definition of "pattern" provided in a subsequent provision of the same bill that contained RICO: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This "pattern" definition was included in the Dangerous Special Offender Act, which was later repealed effective November 1, 1987, but not in RICO. Sentencing Reform Act of 1984, Pub. L. No. 98-473,

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§ 212(a)(2), 98 Stat. 1987; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. The Court observed in *Sedima* that "[t]his language may be useful in interpreting other sections of the Act." 473 U.S. at 496 n.14. However, one commentator has discerningly noted that the language of section 3575(e) "is exclusively focused on the relatedness of the acts," while the legislative history of RICO's "pattern" requirement "does deal with the element of continuity." Black, *Racketeer Influenced and Corrupt Organizations (RICO) – Securities and Commercial Fraud as Racketeering Crime After Sedima: What Is A 'Pattern of Racketeering Activity'?*, 6 Pace L. Rev. 365, 383 (1986). *See also Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "). To the extent that the treatment of "pattern" in the Dangerous Special Offender Act complemented the use of the term in RICO, it was only with regard to the issue of relatedness.

Moreover, the approach advocated herein, by giving effect to the element of "continuity," is consistent with the holding of this Court in *United States v. Turkette*, *supra*, 452 U.S. at 583 (emphasis added), that a RICO "enterprise" must be "proved by evidence of an *ongoing* organization, formal or informal, and by evidence that the various associates function as a *continuing* unit," as well as with the requirement of 18 U.S.C. § 1962(c) that the alleged person "conduct" the affairs of the enterprise through a pattern of racketeering activity. *See, e.g., United States v. Webster*, 669 F.2d 185, 187 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982) (the term "conduct" "signifies repeated, even patterned carrying on of affairs"). And this suggested method of analyzing "pattern" poses no threat to the effective use of the RICO Act as a criminal law enforcement tool, since

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CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit sustaining the District Court's dismissal of petitioners' RICO claims should be affirmed.[14]

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the factors utilized clearly are aimed at the level and degree of illicit conduct which Congress sought to eliminate through the statute's extraordinary remedies. As the Department of Justice already acknowledges in its guidelines, cases which do not involve multiple criminal episodes or transactions should not be prosecuted under RICO. *See* discussion, *supra*, 18.

[14] Petitioners ask that the Eighth Circuit be reversed and that their first amended complaint be reinstated. Brief of Petitioners at 35. However, even if this Court were to determine that the Court of Appeals applied an incorrect standard in assessing the sufficiency of petitioners' "pattern" allegations, the appropriate remedy may well be to vacate the Court of Appeals' judgment and remand for consideration of petitioners' pleading in light of the test articulated by this Court. But in any event, if this Court does not affirm, petitioners would not be entitled to reinstatement of their first amended complaint, because the case would need to be remanded to the Court of Appeals for consideration of the alternate bases for dismissal relied on by the District Court but not addressed by the Eighth Circuit. *See* discussion, *supra*, 9-10.

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